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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAL HATCHER,

Defendant and Appellant.

2d Crim. No. B169501  
(Super. Ct. No. F310609)  
(Santa Barbara County)

Jamal Hatcher was sentenced to 25 years to life after pleading no contest to assault with a deadly weapon by means of force likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1))<sup>1</sup> and admitting two prior felony convictions within the meaning of the Three Strikes law. (§§ 667, subds. (d)-(e); 1170.12, subds. (b)-(c).) He appeals on the ground that the trial court abused its discretion in not striking the prior felony convictions and claims that the sentence is excessive. We affirm.

On March 19, 2001, appellant attempted to kill Malcom Golding, a fellow patient at Atascadero State Hospital. Appellant threatened Golding, removed his belt before entering the hospital dining room, and sat down in a chair backwards, facing Golding's

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<sup>1</sup> All statutory references are to the Penal Code.

back. After Golding sat down to eat, appellant tightly wrapped the belt around Golding's neck and choked him.

Five to seven hospital staff struggled with appellant to get the belt out of his hands. Appellant yelled: "Motherfucker, I'm going to kill you when I get the chance, you fucking Mexican. You wait and see. I'm going to kill you. You hear me? I'm going to kill you." Appellant said that Golding had teased him and that he intended to kill him.

Appellant was charged with attempted premeditated murder (count 1; §§ 664/187), assault with a deadly weapon by means of force likely to cause great bodily injury (count 2; § 245, subd. (a)(1)), and making criminal threats (count 3; § 422). It was alleged that he had suffered two prior serious felony convictions.

The trial court found appellant not competent to stand trial and suspended criminal proceedings on July 2, 2001. (§ 1370.) Criminal proceedings were reinstated on December 12, 2002 after Atascadero State Hospital certified that appellant's competence had been restored. (§ 1372.)

On June 6, 2003, counsel requested that appellant be re-evaluated to determine his competency to stand trial. (§ 1368.) As a state hospital patient, appellant had a history of mental problems. Two doctors submitted psychological evaluations opining that appellant understood the nature and purpose of the proceeding and was able to cooperate with counsel.

Pursuant to a negotiated plea (*People v. West* (1970) 3 Cal.3d 595, 604), appellant pled no contest to assault with a deadly weapon with force likely to cause great bodily injury (count 2; § 245, subd. (a)(1)) and admitted the prior strike allegations. The trial court dismissed counts 1 and 3 for attempted premeditated murder and making criminal threats, and sentenced appellant to 25 years to life.

#### Romero

Appellant contends that the trial court erred in not striking one of the prior convictions to avoid a life sentence. A trial court has limited discretion under section 1385 to strike prior convictions in three strikes cases. (*People v. Superior Court*

(*Romero*) (1996) 13 Cal.4th 497, 530.) The court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court reviewed the probation report, appellant's criminal record and the psychological evaluations. During his stay at Atascadero State Hospital, appellant was hostile, angry, and engaged in horseplay which at times erupted into physical altercations. The psychological evaluations indicated that appellant was malingering, feigned psychiatric symptoms, and pretended to be over-medicated. Doctor David Fennell, a forensic psychiatrist, reported: "Mr. Hatcher is diagnosed as having an anti-social personality disorder. This is characterized by failure to observe societal norms, the rights of others, to be impulsive and not appreciate the consequences of one's actions, and to be untruthful."

Denying the *Romero* motion, the trial court stated: "I have read opinions that you engage in a lot of malingering and choose to do the things that you've done to get yourself in trouble. [¶] It's my opinion that Mr. Hatcher is antisocial and a career criminal and extremely dangerous to the people around him . . . . [H]e should be incarcerated in a facility where a higher level of security can provide him better safety for those sharing [the] same facility with him. It's not just the public who deserves to be protected, but other inmates or patients who share those facilities . . . ."

Citing *People v. Burgos* (2004) 117 Cal.App.4th 1209, appellant argues that it was an abuse of discretion not to grant the *Romero* motion because the prior serious felony convictions arose from a single act. In *Burgos*, the prior strike convictions were for attempted carjacking and attempted robbery. The Court of Appeal held that "not only [do] the two prior convictions arise from the same act, unlike perhaps any other two crimes, there exists an express statutory preclusion on sentencing for both offenses.

Section 215, subdivision (c) permits the prosecution to charge a defendant with both carjacking and robbery under section 211, but expressly states that 'no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.' (*Id.*, at p. 1216.) The Court of Appeal concluded that it was an abuse of discretion not to strike one of the prior convictions. (*Ibid.*)

Burgos' criminal record, aside from the prior strike convictions, consisted of misdemeanors.

*Burgos*, is readily distinguishable. Appellant's criminal history spans more than 20 years and includes five felonies and one misdemeanor. The 1983 convictions for oral copulation by force (§ 288a, subd. (c)) and assault with intent to commit rape (§ 220) arose out of a 10 day crime spree. On October 20, 1983, appellant followed a woman into an office building, knocked her down, and carried her to a bathroom. Holding a knife to the victim's throat, he forced her to orally copulate him and cut her across the hand before fleeing.

Two days later, appellant assaulted a second woman in an apartment elevator. Appellant struck her in the face several times, pushed her down, and ordered her to "Let me do what I want to do." He fled after a neighbor opened the elevator door.

Eight days later, appellant attempted to rob a third woman at a railroad crossing. Appellant reached through the car window and attempted to fondle the victim's breast.

Appellant was charged with five violent felonies and entered into a negotiated plea to oral copulation by force and assault with intent to commit rape. We reject the argument that the prior convictions arose out of a single criminal act. "[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter." (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071.)

Unlike *People v. Burgos, supra*, appellant's current offense involved the use of a deadly weapon. Appellant carried out a well-planned attack and vowed to kill the victim. Based on appellant's lengthy criminal history, the violent nature of the current offense,

appellant's propensity for violence in a controlled hospital setting, and the substantial threat to public safety and hospital patients, the trial court reasonably concluded that appellant did not fall outside the spirit of the Three Strikes Law. (*People v. Williams, supra*, 17 Cal.4th at p. 161; *People v. Carmony* (2004) \_\_\_ Cal.4th \_\_\_, \_\_ [2004 DJDAR 8291, 8293].) Appellant makes no showing that the sentence is irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

#### Cruel and/or Unusual Punishment

Appellant argues that his sentence is excessive and violates the cruel and/or unusual punishment protections of the federal and state Constitutions. (U.S. Const., 8th Amend; Cal. Const., art. I, § 17.)<sup>2</sup> In *Ewing v. California* (2003) 538 U.S. 11, 20-21 [123 S.Ct. 1179, 1185-1186], the United States Supreme Court held that the cruel and unusual punishment clause of the federal Constitution contains a narrow proportionality principle that prohibits grossly disproportionate sentences. The court upheld a 25-year-to-life sentence under the Three Strikes Law for a defendant with prior burglary and robbery convictions who shoplifted three golf clubs. (*Id.*, at pp. 30-31 [123 S.Ct. at p. 1190].) Comparing appellant's current crimes and criminal history with those of the defendant in *Ewing*, we cannot say that his sentence is grossly disproportionate to his criminal culpability.<sup>3</sup> (See also, *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [123 S.Ct. 1166,

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<sup>2</sup> Appellant waived the issue by not raising it at the sentencing hearing. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) "Nevertheless, in order to 'forestall a subsequent claim of ineffectiveness of counsel' [citation], we will consider the issue." (*Ibid.*)

<sup>3</sup> In *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, the Ninth Circuit Court of Appeal found that a three strikes sentence was grossly disproportionate to the crime committed: petty theft with a prior that could be punished as a felony or a misdemeanor. *Ramirez* is distinguishable because the defendant's prior criminal history consisted of three non-violent theft related offenses. (*Id.*, at p. 768.) The court found that "neither the 'harm caused or threatened to the victim or society,' nor the 'absolute magnitude' of Ramirez's three shoplifts justifies the Three Strikes sentence in this case." (*Id.*, at p. 770.)

1175] [two consecutive terms of 25 years to life for thefts of videotapes not grossly disproportionate].)

Appellant's related argument that the sentence violates the California Constitution is without merit. (*People v. Superior Court (Romero)* (2002) 99 Cal.App.4th 1418, 1431-1433.) To prevail, he must show that the sentence is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In reviewing the sentence, we examine the offense and the offender, and compare the punishment for other California offenses and crimes in other jurisdictions. (*Id.*, at pp. 425-427.)

Appellant has abused alcohol and drugs since age 10. His criminal record dates back to 1977 and includes petty thefts, first degree burglary, two escapes from boot camp, attempted commercial burglary, theft of car parts, destruction of a place of confinement, assault with intent to commit rape, forcible oral copulation, resisting an executive officer, and battery on a prisoner. Given appellant's age (38), his criminal history, and the current violent offense, a third strike sentence was proper. We conclude that the sentence conforms to sentences for repeat offenders under the Three Strikes Law and is proportionate to sentences for repeat offenders in other states. (*People v. Meeks* (2004) 117 Cal.App.4th 891, 902-903 [25 years to life for failure to register as sex offender]; *People v. Superior Court (Romero)*, *supra*, 99 Cal.App.4th at pp. 1432-1443 [25 years to life for felony petty theft of magazine]; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1515-1516 [25 years to life; possession of methamphetamine].) "When faced with recidivist defendants such as [appellant], California appellate courts have consistently found the Three Strikes law is not cruel and unusual punishment. [Citations.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.)

Appellant argues that the sentence is excessive because he is borderline retarded and has spent much of his adult life in a state mental hospital. As a mentally disordered offender (MDO; § 2962 et seq.), he has been diagnosed as suffering from paranoid schizophrenia, schizoaffective disorder, polysubstance dependence, paraphilia NOS,

malingering, and antisocial personality disorder. The fact that appellant is an MDO does not exempt him from the Three Strikes Law particularly where the current offense involves a deadly assault on a fellow hospital patient.

The trial court, in sentencing appellant, could not ignore appellant's life of crime, the acts of violence, the substance abuse, appellant's malingering and feigned psychiatric symptoms, and appellant's use of a weapon to strangle a hospital patient. In view of the imminent danger that appellant poses to society and hospital patients, the imposition of a 25 year to life sentence does not shock the conscience or offend fundamental notions of human dignity.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Michael L. Duffy, Judge  
Superior Court County of San Luis Obispo

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Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

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